



## NORTH CAROLINA LAW REVIEW

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Volume 12 | Number 4

Article 2

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6-1-1934

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### Recommended Citation

E. M. Perkins, *The Power of Congress to Levy Taxes for Distribution to the States*, 12 N.C. L. REV. 326 (1934).

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# THE POWER OF CONGRESS TO LEVY TAXES FOR DISTRIBUTION TO THE STATES

E. M. PERKINS\*

Twenty-five years ago Professor Seligman suggested a plan of federal collection of taxes and distribution of the proceeds to the states. His proposal was that the corporation income tax and the inheritance tax should be administered by the federal government and that the revenue should be apportioned in whole or in part among the states. Had he believed that the states needed the revenue from a personal income tax, it appears that his proposal would have included that also; as it was, he recommended federal administration and expenditure for this tax. The difficulties of state administration were the inability to localize income, the danger of double taxation, the complications of interstate commerce, and the ease of a shift of residence to escape income and inheritance taxes. "The question of the constitutionality of the scheme that I have suggested," he wrote, "may be left to the lawyers. My own opinion, expressed with all due diffidence, is that a constitutional method can be devised. But my additional opinion, expressed without any diffidence, is that if constitutional methods cannot be devised, the sooner a constitutional amendment is procured the better it will be. I can see no other avenue of escape from the difficulties that are looming up on all sides."<sup>1</sup>

In the intervening quarter-century some of the difficulties have partly subsided; others have arisen. The clause of the federal estate tax which allows the taxpayer a credit on his federal tax for taxes paid to the states has largely eliminated inheritance tax havens.<sup>2</sup> Court decisions, especially on inheritance taxes, have so marked out

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<sup>1</sup> Seligman, *The Relations of State and Federal Finance* (1909) STATE AND LOCAL TAXATION—THIRD INTERNATIONAL CONFERENCE 213, 224.

<sup>2</sup> Decedents' estates are allowed a credit up to eighty per cent of the federal estate tax of 1926 for any estate or inheritance tax paid to the states. 44 STAT. 70 (1926), 26 U. S. C. A. §1093 (1928). When first adopted in 1924 this credit was limited to twenty-five per cent, but was increased to eighty per cent in 1926. 43 STAT. 304 (1924). The additional federal estate tax enacted in 1932 does not allow a credit in respect of such additional tax. 47 STAT. 245 (1932), 26 U. S. C. A. §1093 (1932). See *Florida v. Mellon*, 273 U. S. 12, 47 Sup. Ct. 265, 71 L. ed. 511 (1927); *Rouse v. United States*, 65 Ct. Cl. 749 (1928). Machen, *The Strange Case of Florida v. Mellon* (1928) 13 CORN. L. Q. 351.

the states' taxing jurisdiction as to decrease double taxation.<sup>3</sup> On the other hand, although the income tax states are growing in number,<sup>4</sup> so long as there are states without income taxes and so long as the tax laws are diverse, individuals and corporations will conduct their affairs to take advantage of these opportunities.<sup>5</sup> Wealth and income have become increasingly the product of national activity and consequently the problems of allocation are more troublesome.<sup>6</sup> Domicile, so important in determining jurisdiction to tax, has less economic and social significance.<sup>7</sup> As the volume of interstate commerce has expanded the problem of its partial immunity from taxation has grown in importance.<sup>8</sup> In addition to these, recent years

<sup>3</sup> *Rhode Island Hospital Trust Co. v. Doughton*, 270 U. S. 69, 46 Sup. Ct. 256, 70 L. ed. 475 (1926); *Wachovia Bank and Trust Co. v. Doughton*, 272 U. S. 567, 47 Sup. Ct. 202, 71 L. ed. 413 (1926); *Farmers Loan and Trust Co. v. Minnesota*, 280 U. S. 204, 50 Sup. Ct. 98, 74 L. ed. 371 (1930); *Baldwin v. Missouri*, 281 U. S. 586, 50 Sup. Ct. 436, 74 L. ed. 1056 (1930); *Beidler v. South Carolina Tax Commission*, 282 U. S. 1, 51 Sup. Ct. 54, 75 L. ed. 131 (1930); *First National Bank of Boston v. Maine*, 284 U. S. 312, 52 Sup. Ct. 174, 76 L. ed. 313 (1932); see *Safe Deposit and Trust Co. v. Virginia*, 280 U. S. 83, 50 Sup. Ct. 59, 74 L. ed. 180 (1929).

<sup>4</sup> At the present time (April 1934) twenty-nine states tax the incomes either of corporations or of individuals, and twenty-six states levy a tax on both. . . . More than half of the American commonwealths have adopted this form of taxation since Wisconsin, a little more than two decades ago, first developed the plan of central administration." Martin, *State Income Taxes* (1934) 7 STATE GOVERNMENT, No. 4. See, *New State Tax Laws* (1933) 11 TAX MAGAZINE 183; Groves, *Recent State Income Taxation in the United States* (1934) 12 TAX MAGAZINE 107.

<sup>5</sup> See *Palmolive Co. v. Conway*, 43 F. (2d) 226 (W. D. Wis. 1930) *aff'd* 56 F. (2d) 83 (C. C. A. 7th, 1932); *Buick Motor Co. v. City of Milwaukee*, 48 F. (2d) 801 (C. C. A. 7th, 1931) *certiorari* denied, 284 U. S. 655, 52 Sup. Ct. 34, 76 L. ed. 556 (1931); Breckenridge, *Tax Escapes by Manipulations of Holding Company* (1931) 9 N. C. L. REV. 189.

<sup>6</sup> See *Underwood Typewriter Co. v. Chamberlain*, 254 U. S. 113, 41 Sup. Ct. 45, 65 L. ed. 165 (1920); *Hans Rees' Sons Inc. v. State of North Carolina*, 283 U. S. 123, 51 Sup. Ct. 385, 75 L. ed. 879 (1931); *Maxwell v. Kent-Coffey Mfg. Co.*, 204 N. C. 365, 168 S. E. 397 (1933) *aff'd* 54 Sup. Ct. 437 (1934); Magill, *Allocation of Income by Corporate Contract* (1931) 44 HARV. L. REV. 935; Huston, *Allocation of Corporate Net Income for Purposes of Taxation* (1932) 26 ILL. L. REV. 725; Ford, *The Allocation of Corporate Income for the Purpose of State Taxation* (1933) SPECIAL REPORT NO. 6 OF THE NEW YORK STATE TAX COMMISSION; notes (1931) 40 YALE L. J. 1273; (1931) 9 N. C. L. REV. 470.

<sup>7</sup> Peppin, *The Power of the States to Tax Intangibles or Their Transfer* (1930) 18 CALIF. L. REV. 638; Mason, *Jurisdiction for the Purpose of Imposing Inheritance Taxes* (1931) 29 MICH. L. REV. 324; Lowndes, *Bases of Jurisdiction in State Taxation of Inheritance and Property* (1931) 29 MICH. L. REV. 850; Rottschaefer, *The Power of the States to Tax Intangibles* (1931) 9 N. C. L. REV. 415; Rottschaefer, *State Jurisdiction of Income for Tax Purposes* (1931) 44 HARV. L. REV. 1075; Rottschaefer, *State Jurisdiction to Impose Taxes* (1933) 42 YALE L. J. 305; see also *supra* note 3.

<sup>8</sup> A number of bills providing for Congressional permission to the states to tax interstate commerce have been introduced in Congress in recent years. In

have brought troubles of their own. A new development has been the increasing utilization of the same sources of revenue by the state and federal governments. The states have invaded the tobacco tax field which the federal government regarded as its resource.<sup>9</sup> And gasoline, which the states considered as theirs, has been subjected to a federal tax.<sup>10</sup> With the return of legal intoxicants both the states and the nation have seized upon this source to help out their revenues. Another development is the adoption of general sales taxes by a number of states with the discovery that the Commerce Clause contributes to the prevention of their completely effective application.<sup>11</sup> These are all problems in the collection of taxes. They involve the danger

the Seventy-third Congress there have been introduced: H. R. 3360 and H. R. 6164, which would grant consent to the states to levy all types of taxes on interstate commerce; H. R. 8231 and H. R. 8303, which would grant consent to the states to tax certain sales made in interstate commerce; H. R. 8913, which is a combination of the two above mentioned types of bills; and H. R. 1639 which would impose federal privilege taxes on manufacturing for sale in interstate commerce and on selling articles in interstate commerce. S. 2897, which is similar to H. R. 8231 and H. R. 8303 and would permit the states to tax certain sales made in interstate commerce, was passed by the Senate on March 15, 1934. 78 CONG. REC. 4695.

<sup>9</sup>In 1933 fourteen states had taxes on tobacco. *Table I (1933) 11 TAX MAGAZINE 122.* "Fourteen states now have taxes on tobacco, and many other states are seriously considering levying such taxes. If the states continue to impose additional levies on tobacco products, the return to the Federal Government from this source of revenue will be further diminished. Since any material increase in these taxes during a period of depression will decrease the amount of tobacco consumed, such increase will adversely affect the producer as well as the manufacturer. Accordingly this Commission recommends that no additional tobacco taxes be adopted by the states for revenue purposes." Heer, *The Interstate Commission on Conflicting Taxation* (1933) 11 TAX MAGAZINE 218.

<sup>10</sup>76 CONG. REC. 2898, January 30, 1933. "Mr. Warren. I happen to be one who thinks this particular tax [the federal gasoline tax] is a most unwarranted transgression, we might say, on the rights of the States. I wonder if the committee, headed by the gentleman, is considering making this Federal tax a permanent thing.

"Mr. Collier. Without agreeing to the gentleman's premise as to this being distinctly a state-matter, I may say they did beat us to it. There has been much pro and con discussion about that. I do not care to go into any argument of the matter, but the states have invaded the Federal Government field in the taxing of cigarettes and other things. . . . In answer to the gentleman's question in regard to the permanency of this tax, I may say to the gentleman from North Carolina that this question was asked the committee a number of times during the hearing. . . . I can not tell what the condition of the Treasury will be a year from now, nor what a future Congress may do, but it is not the intention of the present committee to make this a permanent tax. It is only an emergency matter." See, *State Preserves* (1934) 7 STATE GOVERNMENT 3.

<sup>11</sup>Graves, *Federal Sales Tax with Allocation of Share of Proceeds to the States* (1933) 11 TAX MAGAZINE 372; HEER, A STATE-SHARED FEDERAL SALES TAX, RESEARCH REPORT FOR INTERSTATE COMMISSION ON CONFLICTING TAXATION (1934); Perkins, *The Sales Tax and Transactions in Interstate Commerce* (1934) 12 N. C. L. REV. 99.

of interstate tax competition; the danger that the state legislatures and Congress acting independently of the legislation of the other will burden a subject with heavier taxes than it should pay; the futility of small governmental units exacting tolls from an economic life that generally is unaware of state boundaries; and the waste of duplicate administration of the same taxes by the states and by the federal government.

This situation has led to recent proposals for federal collection and sharing with the states of the inheritance tax, the corporation and personal income taxes, the tobacco, gasoline and liquor taxes, and a general sales tax.<sup>12</sup>

Last year Congressman R. L. Doughton, of North Carolina, Chairman of the Ways and Means Committee, introduced in the House of Representatives a resolution which would direct the Secretary of the Treasury to allocate and pay to the states according to their population, one-sixth of the proceeds from the federal cigarette tax. It provided that the payment should be made to a state only in the event that neither it nor any of its subdivisions imposed any tax on the manufacture or sale of cigarettes.<sup>13</sup> The preamble to the

<sup>12</sup> See, Graves, *supra* note 11; Haig, *Federal Tax Collections with Allocation of Share of Proceeds to the States* (1933) 11 TAX MAGAZINE 95; HEER, *supra* note 11; Seligman, *The Fiscal Outlook and the Coördination of Public Revenues*, CURRENT PROBLEMS IN PUBLIC FINANCE (1933) 261; *The National Tax Association Conference* (1933) 11 TAX MAGAZINE 416; cf. Elwell, *Proposed Surrender of State Taxing Power* (1933) 11 TAX MAGAZINE 176.

<sup>13</sup> H. J. Res. 546, introduced January 10, 1933, would provide, "That (a) upon cigarettes made of tobacco or any substitute therefor, and weighing not more than three pounds per thousand, manufactured in or imported into the United States, which on or after the date of enactment of this Joint Resolution, are sold by the manufacturer or importer, or removed for consumption or sale, there shall be levied, collected and paid under the provisions of existing law in lieu of the Revenue Act of 1926, a tax of \$3 per thousand, to be paid by the manufacturer or importer thereof. As used in this subsection, the term 'United States' includes only the States, the Territories of Alaska and Hawaii, and the District of Columbia.

"(b) As soon as practicable after June 30 and December 31 of each year the Secretary of the Treasury shall ascertain the amount collected from the tax imposed by subsection (a) during the six months' period ending on such date and the amount of refunds and stamp redemptions during such period in respect of such tax. He shall then allocate to the several States, according to their population as shown by the last preceding decennial census, one-sixth of the net amount of the collections thus ascertained. The amount allocated to each State shall be paid to the Treasurer of such State by the Secretary immediately upon the making of such allocation, if he finds that neither such State nor any of its municipalities or political subdivisions (1) has imposed, collected, or had in force any excise, occupational or other tax or fee on the manufacture or sale of cigarettes during such six months' period, or (2) has had in force during such period any prohibition on the manufacture of cigarettes or on the sale thereof to adults, or (3) has in force any law, statute, or ordinance imposing such a tax or fee or providing such a prohibition in respect of any later period."

resolution recited that the state taxes had impaired cigarette sales and contributed to a reduction in the revenue of the federal government and that to protect the federal revenue an adjustment between the tax programs of the federal government and the states was necessary. The resolution was referred to the Ways and Means Committee but no action was taken.

At the Congressional hearings on the taxation of intoxicating liquor, in December 1933, similar proposals for federal collection and apportionment of liquor taxes were considered but met defeat, due in part, it seems, to the difficulty of arriving at a satisfactory method of apportionment. The question of apportionment here was very perplexing because some states that are wet are not entirely wet and it was thought that the population factor in an apportionment formula should be only the wet population of the state and there seemed to be some difficulties in ascertaining that. Another problem was the inclusion of a factor that would satisfy the liquor production states. It was suggested that some states which are dry in that they do not permit the sale of liquor and so would not benefit from federal distribution on the basis of a wetness determined by the possibility of sale, still might permit the manufacture of liquor and by levying production taxes they could disrupt the plan for limited taxation. So it was believed that a production factor should be included to allure these states.<sup>14</sup> This indicates the complexity of an undertaking for federal distribution. The impotence of the states in the collection of taxes and the federal government's eminent position for this task suggests federal collection. But collection is only half of the puzzle, and it seems that federal collection may be successful only if a satisfactory scheme of distribution can be devised.

At the present time the larger part of the federal revenue is collected in a small number of states.<sup>15</sup> The smoker in Montana or

<sup>14</sup> JOINT HEARINGS ON THE TAX ON INTOXICATING LIQUOR, WAYS AND MEANS COMMITTEE AND SENATE FINANCE COMMITTEE, December 11-14, 1933. *Federal-State Liason* (1934) 7 STATE GOVERNMENT, No. 1; Heer, *Splitting the Liquor Taxes* (1933) 6 STATE GOVERNMENT, No. 12.

<sup>15</sup> According to the annual report of the Commissioner of Internal Revenue for the fiscal year ended June 30, 1933, 56.42 per cent of the internal-revenue receipts were in that fiscal year collected in five states. These were: New York, \$376,346,672, 23.23 per cent; North Carolina, \$213,487,759, 13.18 per cent; Pennsylvania, \$114,254,637, 7.05 per cent; Illinois, \$106,114,822, 6.55 per cent; Virginia, \$103,798,963, 6.41 per cent. And with the addition of five other states, the receipts for the ten were 77.68 per cent of the total. The additional five were: California, \$94,674,183, 5.85 per cent; New Jersey, \$71,475,600, 4.41 per cent; Ohio, \$69,477,801, 4.29 per cent; Michigan, \$54,373,207, 3.36 per cent;

Mississippi pays part of the tobacco tax but the collections are made largely in North Carolina and Virginia.<sup>16</sup> So too with the income tax,—the collections are made in New York and Pennsylvania but the people living in other states contribute to the incomes that are taxed.<sup>17</sup> Suppose the federal government undertook to collect income, inheritance, sales, gasoline, liquor and tobacco taxes and return part of the revenue to the states in which collected. Certainly New York would welcome that for the income tax, as would North Carolina for the tobacco tax. Other states might not fare as well. One of the advantages of federal collection of a sales tax or of the gasoline, tobacco or liquor taxes is that the tax can be applied to the manufacturer or producer and the work of collecting is greatly reduced. As a result in many states little would be collected and little returned. The consumers in these states would pay a sales tax and the other taxes but a disproportionate amount of collections would occur in a few states. The same is true of the income tax and the inheritance tax, though the partial payment of these taxes in one state by the contributions of other states is less apparent. Collections as such, then, would not be a satisfactory measure of apportionment.

Kentucky, \$54,130,054, 3.34 per cent. REPORT OF THE COMMISSIONER OF INTERNAL REVENUE FOR FISCAL YEAR ENDED JUNE 30, 1933, at 60.

In the debate on the Fess-Kenyon Bill for vocational rehabilitation Senator Kenyon made these remarks: "Mr. President, I do not believe I have heard an appropriation bill or tax bill under discussion before the Senate for the last two or three years that I have not heard practically that same argument from the Senator from New Jersey—that it is an unfair distribution of public funds, that we are putting it into the South, and that the great industrial centers of New Jersey and New York are paying more than their share. . . . Of course you have more money in New Jersey than certain States in the South have. You have there a great industrial center, and you have to pay more taxes. Perhaps New Jersey does pay more taxes than Iowa, though New Jersey could not live if it were not for Iowa, and some of the Western States and some of the Southern States. We have gotten to the point, I hope, in this country where the welfare of the Southern States is as important to us as the welfare of the Northern States. We are one country. I am growing rather tired, when anything comes up here of this nature, of always being confronted with the proposition that New York and New Jersey are paying all the taxes in the country, and consequently we must have some different method of distribution of funds. Let us get over the idea that we are anything but one country." 58 CONG. REC. 516 (1919).

<sup>16</sup> Tobacco tax collections in North Carolina, Virginia and Kentucky for the fiscal year ended June 30, 1933 were 83.55 per cent of the total. These were: North Carolina, \$199,511,718, 49.53 per cent; Virginia, \$92,380,436, 22.93 per cent; Kentucky, \$44,655,917, 11.09 per cent. REPORT OF THE COMMISSIONER, *supra* note 15, at 36.

<sup>17</sup> Income tax collections in New York for the fiscal year ended June 30, 1933 were \$240,001,792, or 32.14 per cent of the total income tax collections; Pennsylvania, \$65,354,910, 8.75 per cent; Illinois, \$56,453,099, 7.55 per cent; California, \$50,473,239, 6.75 per cent. REPORT OF THE COMMISSIONER, *supra* note 15, at 60.

It would be possible to ascertain from the manufacturers and distributors roughly the volume of gasoline, tobacco and liquor consumed in each state, and apportionment could be based on consumption. The same method could be used for apportioning the sales tax. For the latter the determination of consumption would be more difficult because the agencies reporting on consumption, the manufacturers and distributors, would be more numerous, but this would not be impossible. It would, however, be impossible to determine what part of the income tax and inheritance tax was contributed by each state. Of course the amount collected in each state is known, but collections are not a fair measure of contribution. It cannot be known how much the economic life in one state contributes to the incomes and fortunes that are accumulated in another.

The methods of distribution discussed above are attempts to return to each state an amount proportionate to the taxes paid by the economic life of the state. Opposed to this is the view that the sharing should be on a basis which will engender an equality in governmental advantages. This view emphasizes the national character of our life. It denies that it is either possible or desirable to compute what a state contributes to the federal revenues. It says that the farmer in Georgia or Iowa contributes to the incomes taxed in New York and Illinois. It says that the resident of one state should have the same quality of governmental service enjoyed by the resident of another.<sup>18</sup> Population, according to this view, should be the measure of distribution.

Precisely, this plan in its more comprehensive form involves the withdrawal of the states from the income, inheritance, tobacco, gasoline, liquor and sales tax fields, the imposition of these taxes by the federal government and the distribution of a part of the revenue to the states in proportion to their population. Obviously it involves momentous changes in state and federal finance. The functions of the states and their obligations have been undertaken with the expectation of a fairly steady revenue from certain taxes. The loss of a source of revenue without a commensurate return might seriously disrupt a state's fiscal program.<sup>19</sup>

<sup>18</sup> If this equality of service proposal could be followed consistently, it would call for federal expenditure as theoretically assuring more an equality between different communities and different classes of citizens than is true of state expenditure. Still, it can be argued that the state governments are better qualified to respond to the governmental needs of a community. Also it would be politically impossible to so abruptly and completely abolish the states.

<sup>19</sup> It appears that a few states which now tax cigarettes might not receive



The task of devising a satisfactory plan of distribution is far the most important and troublesome in this field. No pretensions are here made in that direction. The purpose of this article is to discuss the constitutional question which Professor Seligman left to the lawyers.

Has Congress the power to distribute revenues to the states? Slightly different in emphasis, has Congress the power to levy taxes for distribution to the states? The subject is not a new one in our financial history. It was a hundred years ago that the federal government did in effect distribute twenty-eight million dollars among the states. In 1829 President Jackson had predicted that in a short time the national debt would be extinguished and after that it was probable that the Treasury would have a considerable surplus. He suggested that the surplus be apportioned among the states and thought that if this were considered unconstitutional a constitutional amendment authorizing it should be proposed to the states.<sup>20</sup> The surplus which materialized was due to the unwillingness to reduce the tariff and to the increasing revenue from the sale of public lands.<sup>21</sup> A Senate committee estimated in 1835 that there would be as much under the Doughton resolution as they now obtain from their own taxes. *Table I* (1933) 11 TAX MAGAZINE 122. Some states have developed the gasoline tax more intensively than others. A division of this tax according to population would return more to some than they receive at present; others would lose. In the main the more populous states would gain, while some of the sparsely settled would suffer. On the other hand, the losses of the less densely populated states from the gasoline tax distribution would be more than replenished by a division of the income and inheritance taxes, since generally the more sparsely settled a state the fewer and smaller the income tax returns. The same should be true of the sales tax. The poorer states would buy less *per capita* than the more populous and wealthy states. Stumbling-blocks to apportionment of the liquor tax have been noted already. Wet states would object to sharing this tax on a basis of population with dry states or with states that are only slightly wet. This situation may require that the liquor tax be distributed according to consumption, information for which would be obtained from the manufacturers and distributors. There is not this peculiar situation with regard to the other taxes. For these, population may be a more roughly satisfactory measure.

<sup>20</sup> 2 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS (1896) 452. In his second inaugural address in 1805 President Jefferson also suggested distribution to the states. Speaking of the duties on imports he said, "These contributions enable us to support the current expenses of the Government, to fulfill contracts with foreign nations, to extinguish the native right of soil within our limits, to extend those limits, and to apply such a surplus to our public debts as places at a short day their final redemption, and that redemption once effected the revenue thereby liberated may, by a just repartition of it among the States and a corresponding amendment of the Constitution, be applied in time of peace to rivers, canals, roads, arts, manufactures, education and other great objects within each State." 1 *id.* 379.

<sup>21</sup> BOURNE, THE HISTORY OF THE SURPLUS REVENUE OF 1837 (1885) 10; DEWEY, FINANCIAL HISTORY OF THE UNITED STATES (1903) §93.

a surplus of nine million a year for the next eight years.<sup>22</sup> This committee reported a resolution to so amend the Constitution as to permit distribution of this particular surplus.<sup>23</sup> The resolution never came up for a vote.<sup>24</sup> The next year the Senate passed a distribution bill but when it was seen that the House would not accept distribution pure and simple a plan was devised for depositing the surplus with the states subject to the call of the Treasury.<sup>25</sup> Although there seems to have been little expectation that repayment would ever be asked,<sup>26</sup> this shift apparently satisfied the constitutional views of many and the bill passed by large majorities.<sup>27</sup> So in 1837 the surplus was apportioned among the states according to their representation in Congress. They received three installments but financial difficulties prevented the payment of the fourth.<sup>28</sup> Later it was provided that the first three installments should remain on deposit with the states until called for by Congress.<sup>29</sup> Perhaps it is unnecessary to say that no call has been made.

<sup>22</sup> KNOX, UNITED STATES NOTES (1899) 175; BENTON, THIRTY YEARS' VIEW (1854) 557.

<sup>23</sup> The committee, which was headed by Calhoun, reported in part: "Your committee are fully aware of the many and fatal objections to the distribution of the surplus revenue among the States, considered as a part of the ordinary and regular system of this government. They admit them to be as great as can well be imagined. The proposition itself, that the government should collect money for the purpose of distribution, or should distribute a surplus for the purpose of perpetuating taxes, is too absurd to require refutation; and yet what would be when applied, as supposed, so absurd and pernicious, is, in the opinion of your committee, in the present extraordinary and deeply disordered state of our affairs, not only useful and salutary, but indispensable to the restoration of the body politic to a sound condition; . . ." BENTON, THIRTY YEARS' VIEW (1854) 558.

<sup>24</sup> 1 BENTON, *op. cit. supra* note 23, at 567.

<sup>25</sup> *Id.* at 651. Senator Benton protested, "The constitution by the acknowledgment of many who conduct this bill will not admit of a distribution of the revenues. Not further back than the last session, and again at the commencement of the present session, a proposition was made to amend the constitution to permit this identical distribution to be made. That proposition is now upon our calendar for the action of Congress. All at once, it is discovered that a change of names will do as well as a change of the constitution. Strike out the word 'distribute' and insert the word 'deposit,' and, incontinently, the impediment is removed; the constitution difficulty is surmounted; the division of the money can be made. This, at least, is quick work. . . . After all it must be admitted to be a very compendious mode of amending the constitution, and such a one as the framers of that instrument never happened to think of." *Id.* at 653.

<sup>26</sup> 12 BENTON, ABRIDGMENT OF THE DEBATES OF CONGRESS (1859) 774; 12 GALES AND SEATON, REGISTER OF DEBATES IN CONGRESS (1836) 4359, 4372.

<sup>27</sup> 12 BENTON, *op. cit. supra* note 26, at 773; 12 GALES AND SEATON, *op. cit. supra* note 26 at 4379.

<sup>28</sup> BOURNE, *op. cit. supra* note 21, at 35; KNOX, *op. cit. supra* note 22, at 183; DEWEY, *loc. cit. supra* note 21.

<sup>29</sup> 5 STAT. 201 (1837). In 1884 the State of Virginia petitioned for a writ of

The predominant expression of opinion was that federal distribution of revenues was unconstitutional. Proponents of distribution sought to distinguish the situation as extraordinary,<sup>30</sup> something akin to an emergency; also it was argued that the surplus resulted from the sale of public lands and to distribute this would not be a distribution of taxes.<sup>31</sup> Opponents denied these contentions<sup>32</sup> and talked, as always, of "the principle involved." One has only to read the protests against distribution a century ago to find expressed the arguments of today. Senator Benton pictured "the degradation of mendicant states receiving their annual allowance from the bounty of the federal government."<sup>33</sup> President Jackson, who had come to

mandamus upon the Secretary of the Treasury to compel him to pay the fourth installment. The petition was denied. The Court said that the Acts of 1836 and 1837 had made the installment a charge upon the surplus revenue in the Treasury on January 1, 1839. On that date there was not sufficient revenue in the Treasury to meet the installment. And Congress had not, since that time, made the installment a charge on revenue accruing subsequently. Hence the Secretary had no authority, without further direction of Congress, to pay the fourth installment. Also it was said the Act of 1836 "created no debt or legal obligation upon the part of the government, but only made the States the depositories, temporarily, of a portion of the public revenue not needed as it was then supposed, for the purposes of the United States." *Ex Parte Virginia*, 111 U. S. 43, 28 L. ed. 346 (1884).

<sup>30</sup> "I think it safest to treat the present state of things as extraordinary," said Daniel Webster, "as being the result of accidental causes, or causes the recurrence of which hereafter we cannot calculate upon with certainty. There would be unsuperable objections, in my opinion, to a settled practice of distributing revenue among the States. It would be a strange operation of things, and its effects on our system of government might well be feared. I cannot reconcile myself to the spectacle of the States receiving their revenues, their means even of supporting their own governments, from the Treasury of the United States." 4 WORKS OF DANIEL WEBSTER (1851) 256. 3 WORKS OF JOHN C. CALHOUN (1853) 581. See the report of the committee, *supra* note 23.

<sup>31</sup> Henry Clay stated this view, "... I unite cordially with those who condemn the application of any principle of distribution among the several States, to surplus revenue derived from taxation. I think income derived from taxation stands upon ground totally distinct from that which is received from the public lands. . . . The powers of Congress over the public lands are broader and more comprehensive than those which they possess over taxation and the money produced by it." 9 BENTON, *op. cit. supra* note 26, at 495, 509.

<sup>32</sup> 12 GALES AND SEATON, *op. cit. supra* note 26, at 3859. Benton thus reports the argument of Senator Wright of New York: "The taxing powers of this Government were to be used to accumulate money for distribution to the sovereign and independent States of the Confederacy. Those States were to be taught to look to this Government for the means to supply their wants; for the money to sustain their institutions; for the funds to meet their legislative appropriations. Can relations of this sort be established and the independence of the States be preserved? . . . What step can be so eminently calculated as this to produce speedy and perfect consolidation?" 12 BENTON, *op. cit. supra* note 26, at 765.

<sup>33</sup> 1 BENTON, *op. cit. supra* note 23, at 561. "Sir, I am opposed to the whole policy of this measure. I am opposed to it as going to sap the foundations of the Federal Government, and to undo the constitution, and that by evasion in

regret his earlier suggestion of distribution, warned that "The proportion may be increased from time to time, without any departure from the principle now asserted, until the State governments shall derive all the funds necessary for their support from the Treasury of the United States, or if a sufficient supply should be obtained by some States and not by others, the deficient States might complain; and to put an end to all further difficulty Congress, without assuming any new principle, need go but one step further and put the salaries of all State governors, judges, and other officers, with a sufficient sum for other expenses, in their general appropriation bill."<sup>34</sup> Senator Hayne a few years earlier had queried, "The gentleman . . . advocated the passage of his bill, on the ground that it would be easier for the Federal Government to raise this revenue and return it, than it would be for each State to raise sufficient for its own purposes; but, when the constitution was formed, was it ever imagined that the States would require the aid of the Federal Government to levy taxes for domestic purposes within their individual boundaries?"<sup>35</sup> Clay, Webster and Calhoun, although supporting distribu-

the very point for which the constitution was made. What is that point? A Treasury! A Treasury! A Treasury of its own, unconnected with, and independent of the States. It was for this that wise and patriotic men wrote, and spoke and prayed for the fourteen years that intervened from the declaration of independence, in 1776, to the formation of the constitution in 1789." And he continued, "A new surplus party will supersede the present surplus party, as successive factions supersede each other in chaotic revolutions. They will make Congress the *quaestor* of provinces, to collect money for the States to administer." *Id.* at 655 and 657.

<sup>34</sup> 3 RICHARDSON, *op. cit. supra* note 20, at 66. In 1832 a bill was passed providing for the distribution among the states of the revenue from the public lands. This was vetoed by President Jackson. He was opposed to the bill which passed in 1836 depositing the surplus with the states, yet it was enacted by large majorities and he signed it.

<sup>35</sup> 10 BENTON, *op. cit. supra* note 26, at 229. Senator Dickerson of New Jersey had in 1826 introduced a bill directing the Secretary of the Treasury to divide among the states five million dollars annually for four years. The bill was discussed but never passed. "This is intended as an experiment," he said, "which, if successful, will no doubt be followed by an adoption of its principle in a more permanent form. One object of this bill is to provide funds in all the States, for the purposes of education and internal improvement, by a rule which shall operate justly, equally and harmoniously throughout every part of the Union. Another object is to transfer to the Legislatures of the States the application of a part of the surplus funds of the General Government and thus relieve Congress from a weight of legislation, which from its mass alone is becoming truly formidable, but much more so from its producing a concentration of power in the General Government, never intended to be vested there by those who formed our constitution. It is not intended, by this bill, to exercise any control over those funds, after the same have been distributed to the States. . . ." 9 *Id.* at 288.

tion of the particular surplus, denied that Congress had power generally to collect taxes and distribute them among the states.<sup>36</sup>

Certainly it is improbable that the framers of the Constitution ever anticipated that the federal government would collect taxes for the support of the states. Article I, Section 8, Clause 1 of the Constitution provides that "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States." It was intended to give the federal government adequate revenue powers, which it did not possess under the Confederation. The states could take care of their own finances; the federal government needed its taxing powers to supply itself with funds. This phrase, "to lay and collect taxes . . . to pay the debts and provide for the common defense and general welfare of the United States," has been one of the most controversial in the Constitution. Madison explained that the first draft of the clause gave power "to lay and collect taxes, duties, imposts and excises." Then it was desired to assure power to pay the then existing debts of the United States. In the Articles of Confederation, the expenses for which requisitions were to be made on the states, were the "charges of war, and all other expenses that shall be incurred for the common defense or general welfare." Madison thought that the phraseology about the common defense and general welfare was "regarded in the new as in the old instrument merely as general terms, explained and limited by the subjoined specifications; and therefore requiring no critical attention or studied precaution," and his opinion was that "but for the old debts and their association with the terms 'common defense and general welfare,' the clause would have remained as reported in the first Draft of a Constitution, expressing generally a 'power in Congress to lay and collect taxes, duties, imposts and excises'; without any addition of the phrase 'to provide for the common defence and general welfare'."<sup>37</sup> Mr. Charles Warren thinks

<sup>36</sup> *Supra* notes 23, 30, 31.

<sup>37</sup> 3 FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION* (1911) 483. Madison stated this view in a letter to Andrew Stevenson, November 17, 1830. "Consider for a moment," he wrote, "the immeasurable difference between the Constitution limited in its powers to the enumerated objects; and expanded as it would be by the import claimed for the phraseology in question. The difference is equivalent to two Constitutions, of characters essentially contrasted with each other; the one possessing powers confined to certain specified cases; the other extended to all cases whatsoever: For what is the case that would not be embraced by a general power to raise money, a power to provide for

that the probable reason for the insertion of the phrase was that if the clause had stopped after the addition of the words "to pay the debts of the United States" it "might have been construed as giving Congress the power to levy and collect taxes to pay the old debts and only for that purpose. Some words evidently had to be added that would make clear the power of Congress to levy taxes for all the National purposes set forth in the grants of power subsequently specified in this section. Evidently the Committee selected these words 'to provide for the common defence and general welfare' as comprising all the other purposes for which Congress was to be empowered to levy and collect taxes."<sup>38</sup> That, however, has not been the prevailing interpretation given the terms by the legislative and executive branches of the government. The judicial branch has never spoken.<sup>39</sup> According to this opposing view, Congress may levy taxes and appropriate money for anything that it considers to be for the general welfare, whether or not the purpose falls within the more particularly specified powers of Congress.<sup>40</sup> Upon the theory of

the general welfare, and a power to pass all laws necessary and proper to carry these powers into execution; all such provisions and laws superseding at the same times, all local laws and constitutions at variance with them. Can less be said with the evidence before us furnished by the Journal of the Convention itself, than that it is impossible that such a Constitution as the latter would have been recommended to the States by all the members of that Body whose names are subscribed to the Instrument."

<sup>38</sup> WARREN, *THE MAKING OF THE CONSTITUTION* (1928) 475.

<sup>39</sup> In a case unrelated to taxation Chief Justice Marshall remarked, "Congress is authorized to lay and collect taxes, etc., to pay the debts, and provide for the common defence and general welfare, of the United States. This does not interfere with the power of the States to tax for the support of their own governments; nor is the exercise of that power by the States, an exercise of any portion of the power that is granted to the United States. In imposing taxes for State purposes, they are not doing what Congress is empowered to do. Congress is not empowered to tax for those purposes which are within the exclusive province of the States. When, then, each government exercises the power of taxation, neither is exercising the power of the other." *Gibbons v. Ogden*, 9 Wheat. 1, 199, 6 L. ed. 23 (U. S. 1824).

<sup>40</sup> See, 3 STORY, *COMMENTARIES ON THE CONSTITUTION* (1833) ch. 14; Tucker, *Judge Story's Position on the So-Called General Welfare Clause* (1927) 13 A. B. A. J. 363, 465. In his Report on Manufactures in 1791 Hamilton wrote, referring to the power to lay taxes to provide for the general welfare, "The phrase is as comprehensive as any that could have been used, because it was not fit that the constitutional authority of the Union to appropriate its revenues should have been restricted within narrower limits than the 'general welfare,' and because this necessarily embraces a vast variety of particulars which are susceptible neither of specification nor of definition.

"It is, therefore, of necessity left to the discretion of the National Legislature to pronounce upon the objects which concern the general welfare, and for which, under that description, an appropriation of money is requisite and proper. And there seems to be no room for doubt that whatever concerns the general interests of learning, of agriculture, of manufactures, and of commerce,

expending money to provide for the general welfare the federal government has engaged in activities which could be justified under other clauses of the Constitution only by straining of the imagination. Appropriations for many of the activities of the Department of Agriculture and of the Department of Labor and appropriations for the advancement of education, the promotion of maternity and infancy hygiene and for vocational rehabilitation, among others, would seem to rest on this theory.

The development of federal aid to the states for education is an illuminating chapter in constitutional theory and legislative practice. In 1859 the Morrill Bill, which provided for a grant of a portion of the public lands to each state for the establishment of agricultural colleges, passed Congress by small majorities and was vetoed by President Buchanan on the ground that it was unconstitutional. The measure had been supported as within the power conferred in Article IV, Section 3 of the Constitution which says that "The Congress shall have power to dispose of . . . the territory . . . belonging to the United States."<sup>41</sup> President Buchanan answered that the power to dispose did not mean to make gifts such as these; that Congress might manage the lands and make grants as a prudent proprietor to enhance the value of the remaining lands, but the establishment of agricultural colleges in New York or Virginia would not, he said, improve the value of public lands in California or Minnesota.<sup>42</sup> Two years later the political and constitutional complexion of Congress and the Executive had changed. The bill now passed with large majorities and was signed by President Lincoln.<sup>43</sup>

Next came the Hatch Act in 1887 which granted fifteen thousand dollars a year to each state for the purpose of establishing experiment stations in connection with the agricultural colleges.<sup>44</sup> This was a grant not of land but of money. And that seemed to be an imposition on the constitutional views of some Senators. They would con-

are within the sphere of the national councils, as regards an application of money.

"The only qualification of the generality of the phrase in question, which seems to be admissible is this: That the object to which an appropriation of money is to be made be general, and not local; its operation extending in fact or by possibility throughout the Union, and not being confined to a particular spot." 4 WORKS OF ALEXANDER HAMILTON (Lodge ed.) 151.

<sup>41</sup> CONG. GLOBE, 35th Cong., 1st Sess., p. 1696; *id.* 2nd. Sess., p. 851.

<sup>42</sup> 5 RICHARDSON, *op. cit. supra* note 20, at 543, 550.

<sup>43</sup> 12 STAT. 503 (1862). The Act granted thirty thousand acres to each state for each of its Senators and Representatives. Land scrip was given to the states which did not have any of the public domain within their borders.

<sup>44</sup> 24 STAT. 440 (1887).

cede that Congress had the power to dispose of the public domain as it did in the Morrill Act, but to pay tax money to the states out of the Treasury was said to be a very different matter.<sup>45</sup> So an amendment was adopted which provided that the appropriation be made "out of any money in the Treasury proceeding from the sales of public lands." The theory was that it was now accepted that Congress had absolute power of disposal of the public lands and consequently over the proceeds from the sale of the lands. This amendment permitted doubting Senators to vote for the bill and to those without constitutional doubts it was immaterial.<sup>46</sup> Three years later the second Morrill Act appropriated to each state a sum of money, beginning with fifteen thousand dollars a year and increasing to twenty-five thousand, for the maintenance of the agricultural colleges.<sup>47</sup> Again the form of appropriating money from the sale of public lands was adopted for what it was worth.<sup>48</sup> In 1906 the Adams Act increased the appropriation granted the experiment stations under the Hatch Act.<sup>49</sup> The understanding was that the bill was the same as the Hatch Act, only increasing the amount appropriated.<sup>50</sup> However, the public land phraseology which had

<sup>45</sup> 18 CONG. REC. 726, 727, 1040, 1045 (1887).

<sup>46</sup> "Senator Hawley. There are many Senators who hold the view that money raised by the ordinary forms of taxation ought not to be applied to appropriations of this description, but they are perfectly willing to vote for bills that shall take money for this particular purpose out of the proceeds of the sales of public lands, holding that that is in some way different from any other money in the Treasury as it may be said to be in trust for the general welfare of the States of the Union. Now I conceive that it makes no possible difference to any of us who do not hold that view; but there are some Senators here who will vote for this bill with that provision in it who will not without it. It is their constitutional view." 18 CONG. REC. 1080 (1887); *id.* at 1045.

<sup>47</sup> 26 STAT. 417 (1890).

<sup>48</sup> 21 CONG. REC. 6372 (1890). It should not be thought that all Senators considered there was a distinction between revenues from the public lands and revenues from taxation. In the debate on the Blair Education Bill in 1890 Senator Blair protested that, "The subterfuge and pretense . . . that there is a difference between the power of Congress to apply land, or money derived from the sale of land, to education, and the power to apply any other money derived from taxation, is manifestly absurd. . . ." 21 CONG. REC. 1073 (1890); *id.* at 1865, 6341. In the House this view was stated: "Mr. Blount. . . as to the constitutionality of this question, is not that a thing of the past? . . . For instance, you have got your colleges based on the land scrip of 1862, and you have your experiment stations based on the act of 1887; and as I understand it, the effect of this bill is simply to increase the amount appropriated. . . . Therefore we are not confronted here with the question as to whether we are adopting this or that system, but we have it now, and this is just to extend its operation." *Id.* at 8832.

<sup>49</sup> 34 STAT. 63 (1906).

<sup>50</sup> 40 CONG. REC. 2627 (1906).



satisfied constitutional objectors did not appear in the new Act. In fact the annual appropriations for carrying out the Hatch Act had been made "out of any money in the Treasury not otherwise appropriated," abandoning the public land formality which had been used only in securing the original passage of the Act.<sup>51</sup> The next year the Nelson Amendment in similar manner increased the appropriation for the agricultural colleges without any phraseology about the proceeds from the sale of public lands.<sup>52</sup> The pretense had been abandoned and federal aid for agricultural education was now an accepted function of the federal government. Opponents of federal aid continued to protest but without hope of preventing the appropriations. "I do not know of any provision in the Constitution or any right that belongs to the Government itself that would authorize this kind of legislation; but that has passed and gone," said Senator Works. And Senator Brandegee added, ". . . I do not think it need surprise . . . anybody . . . that the Government is now proposing to engage upon another activity which I think probably the framers of the Constitution would have regarded as utterly outside the province of national activity. I think, however, the barriers which were put up by the Constitution against these extra-constitutional movements, have long since been broken down." To which Senator Cummins replied, "I do not think that any barriers have been broken down that ought to be maintained. I am glad to see the Government of the United States enlarge its activities for the benefit and advantages of the people. . . ."<sup>53</sup>

<sup>51</sup> 25 STAT. 334 (1888); 26 STAT. 288 (1890); 27 STAT. 80 (1892); etc. See remarks of Senator Blair, 21 CONG. REC. 6372 (1890).

<sup>52</sup> 34 STAT. 1281 (1907). 41 CONG. REC. 3546, 4491 (1907).

<sup>53</sup> 51 CONG. REC. 2574 (1914). These remarks occurred during debate on the Smith-Lever Act. In the discussion of the Sheppard-Towner Bill Senator Thomas said: "A man is a fool who in the Congress of the United States questions the constitutionality of any bill these days. He only provokes ridicule, if not pity and contempt. What is the Constitution between appropriation bills and their exponents? What does it amount to in the face of an overwhelming petition of those who are interested in a given measure? In the first place, there will be very few who will question it in the courts unless it immediately concerns them and in the next place any and everything seems to be in the power of the Federal Congress that the judgment, the whim, or the caprice of our several Members seem to think desirable. So I shall say nothing about the constitutionality of the measure beyond asserting that in my judgment if such legislation as this had been supposed even a remote fantastic possibility in the early days the Constitution of the United States would never have been ratified." 60 CONG. REC. 420 (1920).

In regard to the same measure Senator Pittman's view was: "The States should provide the appropriations and the means of educating the people with regard to the matters provided in this bill; but few of the States have done it,

The Smith-Lever Act in 1914 provided for federal aid to the states for agricultural extension work.<sup>54</sup> In 1917 the Smith-Hughes Act provided aid for vocational education.<sup>55</sup> The Fess-Kenyon Act in 1920 provided aid for vocational rehabilitation of persons disabled in industry.<sup>56</sup> And the next year the Sheppard-Towner Act furnished aid to the states for the education of women in maternity and infancy hygiene.<sup>57</sup> All of these measures in recent years were enacted by sizeable majorities, and when proponents have the necessary votes they generally do not discuss constitutional questions at length. The view usually stated was that legislation of this sort was of long standing and the question of its constitutionality was a thing of the past.<sup>58</sup> Only rarely was the power to levy taxes to provide and the death and disease that is spreading throughout the whole country by reason of this failure of State action is affecting every State, and therefore it is the duty of the Federal Government to act. It is forced on the Federal Government, and it does not lie in the mouth of any State rights man or the governor of any State or the people of any State to complain against this legislation when the conditions that require the legislation are due to the negligence of those same complainants." *Id.* at 456. See 53 CONG. REC. 1379 (1916); 61 CONG. REC. 7984 (1921).

<sup>54</sup> 38 STAT. 372 (1914).

<sup>55</sup> 39 STAT. 929 (1917).

<sup>56</sup> 41 STAT. 735 (1920).

<sup>57</sup> 42 STAT. 224 (1921). The original act authorized an annual appropriation for five years. When the question of extending the work was before the Senate in 1927 it appears that opponents conducted a filibuster and a compromise agreement to extend the work for two years was reached and entire repeal of the act was to take place in 1929. 68 CONG. §1585 (1927).

<sup>58</sup> In the Sheppard-Towner discussion Senator Walsh of Montana said: "Mr. President, I am in sympathy with the principles of this measure and want to give the bill my support. I am not seriously troubled about the question of power with respect to legislation of this character. It is true there is no express delegation of power in the Federal Constitution to the Congress of the United States to deal with a subject of this character. Neither is there any such delegation of power over the subject of education. That was reposed, under our kind of government, in the States. Understanding that fact from the very beginning of the Government Congress has been making grants of public lands to the States in the interest of education. I believe those grants began with the very beginning of our Government and have gone on at intervals ever since, and I am entirely unable to distinguish in principle between the grant of public lands from the Government to the States in aid of education, which lands might have been sold for cash and the cash turned into the Treasury, and the grant of money outright for the purpose of aiding the States in their work of education. The practice has gone on too long; it has become sanctioned by usage to such an extent that I apprehend no one at this day would be heard to say that it is beyond the scope of the powers of the Federal Government to vote aid to the States for the purpose of carrying on the work of education. Mr. President, if the Government may thus make grants of land or of money to the States for the purpose of educating children, it would be difficult to establish that it has not the power to grant aid, either in money or land, to aid in bringing children into existence, and that is the purpose of this bill, as I understand it." 60 CONG. REC. 461 (1920). See 54 CONG. REC. 716 (1916); 58 CONG. REC. 6656 (1919).

for the general welfare enunciated as the justification for Congressional action.<sup>59</sup>

The nature of these federal subsidies to the states for the promotion of agricultural extension work, vocational education, vocational rehabilitation and maternity and infancy hygiene should be considered in relation to the proposal for federal collection and distribution.<sup>60</sup> They have been grants of money from the federal treasury for the purpose of aiding the states in carrying on specified projects. Their enjoyment by a state has been conditioned upon the state's appropriating funds to match the federal allotment and their expenditure by the state in compliance with federal standards.<sup>61</sup> The points of similarity to the suggested federal collection and distribution of taxes are that the distributed funds come from federal revenues, that the use of the money is by the state government, and that receipt of the funds is upon condition. In the one case the condition is that the state match the federal funds and utilize them according to federal standards and in the other case the condition is that the state refrain from levying certain taxes. They are dissimilar mainly in that the grants so far have been to aid particular activities which presumably the federal government could undertake alone, while the proposed distribution is a subsidizing of state government generally. Assuming that Congress may levy taxes and make appropriations for projects such as vocational rehabilitation on the theory of providing for the general welfare, may it go the further distance and levy taxes for distribution to the states to do with as they see fit? Is that levying taxes to provide for the general welfare? By a constitutional

<sup>59</sup> Congressman Barkley had stated that the Sheppard-Towner Bill was constitutional under the general welfare clause. He was asked by Congressman Layton: "Can we not just as readily—and I would like to have a categorical answer—just as easily, under the general-welfare clause of the Constitution, have a bureau in Washington for the foodless, another bureau for the clothesless, another bureau for the houseless. . . ?" Congressman Barkley: "I am inclined to think that under the general-welfare clause Congress could do all of those things without violating the Constitution. Whether it desires to do them is another question. . . ." 61 CONG. REC. 7932 (1921).

<sup>60</sup> Federal aid to the states for highways, for forest fire prevention, and for the national guard are not here considered since this aid would seem to rest securely upon other clauses of the Constitution: the power to regulate interstate commerce and to establish post roads, in the case of aid for highways; the power to make needful rules and regulations respecting the public domain, and the power to regulate interstate commerce, in the case of aid for forest fire prevention; and the power to provide for the militia.

<sup>61</sup> See, MACDONALD, *FEDERAL AID* (1928); KEITH AND BAGLEY, *THE NATION AND THE SCHOOLS* (1920); Burdick, *Federal Aid Legislation* (1923) 8 CORN. L. Q. 324; Corwin, *The Spending Power of Congress—Apropos the Maternity Act* (1923) 36 HARV. L. REV. 548.

test which imagines what the framers considered a proper federal expenditure this proposal must fail. For it is most unlikely that even Alexander Hamilton ever intended that the general welfare should be so provided for.<sup>62</sup> But if the view is taken that the general welfare is whatever Congress determines it to be, then it should be constitutional for Congress to levy taxes to distribute to the states if it considered that the general welfare would thereby be benefitted.

One of the causes behind the proposed federal collection and distribution is that the independent utilization of the same forms of taxes by the state and federal governments impairs the revenue yield for both. Under the Constitution the federal government and the states are largely free to use the same methods of taxation.<sup>63</sup> They are free to fix their rates without regard to what the other is doing. The combined amounts of the federal tax and the state tax on the sale of a commodity may be such that the sale will be severely restricted and this source of revenue to that extent lost to both governments. And too, this curtailment in business activity produces a decrease in revenue from income taxation. The development of state taxes on tobacco in addition to the federal tax motivated the Doughton resolution for sharing the cigarette receipts with states which would refrain from taxing this commodity. The states have been assured that the federal tax on gasoline is an emergency measure and that this field will be left to them as soon as the federal government can find some other way to meet its expenses.<sup>64</sup> Should the federal government be forced to continue this tax it may find that a control over the total tax burden on gasoline will enable it to improve the yield. The possibility that independently developed state and federal liquor tax rates might result in the continuance of boot-

<sup>62</sup> Perhaps, however, Hamilton would not have been averse to such an expenditure. Madison's Journal on June 19, 1787 records that Col. Hamilton said: "He had not been understood yesterday. By an abolition of the States, he meant that no boundary could be drawn between the National and State Legislatures; that the former must therefore have indefinite authority. If it were limited at all, the rivalry of the States would gradually subvert it. Even as Corporations the extent of some of them as Virginia, Massachusetts, etc., would be formidable. *As States*, he thought they ought to be abolished. But he admitted the necessity of leaving in them, subordinate jurisdictions. . . ." 1 FARRAND, *op. cit. supra* note 37, at 323. *Supra* note 40.

<sup>63</sup> Congress is forbidden to tax exports (Art. I, §9, cl. 5); and the requirement that direct taxes be apportioned according to population (Art. I, §9, cl. 4) is, in effect, a prohibition on property taxes. The states may not tax imports or exports or tonnage without the consent of Congress (Art. I, §10, cl. 2, 3).

<sup>64</sup> *Supra* note 10; HEARINGS ON REVENUE REVISION (1934) COMMITTEE ON WAYS AND MEANS, at 821.

legging as a profitable enterprise was presented to a Congressional committee, where an arrangement for federal sharing of the liquor tax was urged.<sup>65</sup> Can a constitutional justification for federal collection and distribution be found in the necessity for the federal government to protect its revenues?

The Doughton resolution appears to have been drafted with this idea. The preamble states that it is a resolution, "To preserve and stabilize the revenue to the United States derived from the sale of cigarettes, and for other purposes. Whereas several of the States have levied taxes on cigarettes which have impaired the sales of cigarettes and have contributed to a reduction in the revenue of the Federal Government; and whereas it is necessary to bring about an adjustment between the taxing programs of the Federal Government and the States in order to protect the revenues of the Federal Government; and, whereas it is in the interest of the general welfare of the people of the United States that the taxes on cigarettes be stabilized; therefore, be it resolved. . . ."<sup>66</sup> Before the Constitution was ratified the contention was made that the power of Congress to tax might be used to exclude the states from the exercise of their concurrent taxing power. Hamilton, writing in *The Federalist*, thus stated the argument before he undertook to refute it: "As the laws of the union are to become the supreme law of the land; as it is to have power to pass all laws that may be necessary for carrying into execution the authorities with which it is proposed to vest it; the national government might at any time abolish the taxes imposed for state objects, upon the pretence of an interference with its own. It might allege a necessity of doing this, in order to give efficacy to the national revenues; and thus all the resources of taxation might by degrees, become the subjects of federal monopoly, to the entire exclusion and destruction of the state governments."<sup>67</sup> Such an attempt to abridge the powers of the states, Hamilton said, would be an

<sup>65</sup> *Supra* note 14.

<sup>66</sup> *Supra* note 13.

<sup>67</sup> THE FEDERALIST (1842 ed.) No. 31, at 138. Edmund Randolph, speaking in the Virginia convention, said: "I had an objection which pressed heavily on my mind—I was solicitous to know the objects of taxation. I wished to make some discrimination with regard to the demands of Congress, and of the states, on the same object. As neither can restrain the other in this case; as the power of both is unlimited, it will be their interest mutually to avoid interferences. It will most certainly be the interest of either to avoid imposing a tax on an article, which shall have been previously taxed by the other. This consideration, and the structure of the government satisfy me." 3 FARRAND, *op. cit. supra* note 37, at 309.

assumption of power, unwarranted by any clause of the Constitution. As the Constitution had restrained the states from imposing duties on imports and exports, this implied, he said, that the authority of the states to levy all other forms of taxes remained undiminished. He hoped that the mutual interests of the states and the federal government would lead them to refrain from overburdening a revenue source, but he saw nothing in the Constitution which would permit the federal government to control state taxes.<sup>68</sup> The decisions are replete with statements that the taxing power of the states is "an essential function of government," "an attribute of sovereignty," and "is indispensable to the existence of the state."<sup>69</sup> Yet consider the fate of this power in an instance where it has conflicted with the federal taxing power. A federal statute provides that "whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor in the hands of executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied."<sup>70</sup> It has been held that under this statute taxes owed to the United States have a priority over taxes owed to the states, and that it is within the power of Congress thus to provide.<sup>71</sup> And it is so held because the Constitution gives Congress the power to levy and collect taxes and says that the laws made in pursuance of the Constitution are the supreme law of the land. That, it seems, is very close to what Hamilton assured the adversaries of the Constitution would be an unwarranted assumption of power. To secure the federal revenue the states were forced to yield. If Congress has the power to subordinate state claims to those of the federal Treasury in order to protect its finances it should have the power to collect taxes for distribution to the states if that is necessary to safeguard the federal revenue. The suggested plan does not purport to go the limit of Hamilton's hypothesis and forbid the states to levy taxes on subjects selected by the federal government. The states would be at liberty to continue their tobacco taxes or any of the others, but if they did they

<sup>68</sup> THE FEDERALIST, *supra* note 67, at 142.

<sup>69</sup> *McCulloch v. Maryland*, 4 Wheat. 316, 428, 4 L. ed. 579 (U. S. 1819); *Lane County v. Oregon*, 7 Wall. 71, 76, 19 L. ed. 101 (U. S. 1869); *Union Pacific Railroad Co. v. Peniston*, 18 Wall. 5, 29, 21 L. ed. 787 (1873).

<sup>70</sup> 31 U. S. C. A. 191 (1927).

<sup>71</sup> *Spokane County v. United States*, 279 U. S. 80, 49 Sup. Ct. 321, 73 L. ed. 621 (1929); *United States v. San Juan County*, 280 Fed. 120 (W. D. Wash. 1922); *Stover v. Scotch Hills Coal Co.*, 4 F. (2d) 748 (W. D. Pa. 1924). See *United States v. Fisher*, 2 Cranch 358, 397, 2 L. ed. 304 (1804); *United States v. Snyder*, 149 U. S. 210, 214, 13 Sup. Ct. 846, 37 L. ed. 705 (1893).

would not share in the distribution. If the Doughton resolution is constitutional as a needful measure to protect the federal revenue from tobacco, the proposal in its more comprehensive form should be valid though these other tax sources may not be endangered at present or may not even be the subject of federal taxation, since a comprehensive distribution may be necessary for the success of any distribution scheme.

Of course the proposal is designed as much if not more for the benefit of the states' revenues as for those of the nation. The states have as much to gain from the elimination of interstate tax competition as is to be gained for the nation and the states from a controlled fiscal system which prevents double taxation. The states are in a more precarious financial condition than the nation and their inability to finance themselves adequately has recently required that the federal government finance activities formerly regarded as more properly a field for state government. These should not at the present time be considered improper federal expenditures since they might be necessary to sustain the Constitution itself. In order to relieve itself of these additional burdens the federal government may have to assist the states by some plan which removes the causes of inadequate state revenues. One suggestion for the elimination of tax competition among the states is for an extension of the federal estate tax credit clause to other forms of taxes.<sup>72</sup> Another is the proposal for federal collection and distribution. In such an undertaking the proposal should be constitutional.

The constitutionality of federal aid has never been passed upon by the courts. Attempts to contest the Sheppard-Towner Act for promoting maternity and infancy hygiene were made in two cases, *Massachusetts v. Mellon* and *Frothingham v. Mellon*.<sup>73</sup> The two suits, one by a state for herself and as representative of her citizens, the other by an individual taxpayer, were both brought to enjoin the Secretary of the Treasury and other officials from carrying out the statute. Both suits were dismissed for want of jurisdiction and the

<sup>72</sup> Edmunds, *Extension of Rebate of Federal Taxes to the States* (1933) 11 TAX MAGAZINE 92; Seligman, *op. cit. supra* note 12.

<sup>73</sup> These cases were decided and reported together, 262 U. S. 447, 43 Sup. Ct. 597, 67 L. ed. 1078 (1923); notes (1924) 37 HARV. L. REV. 750; (1923) 9 CORN. L. Q. 50. Albers, *Our National Constitution: Provisions for the General Welfare* (1929) 9 B. U. L. REV. 152, 165 (suggesting "the enactment of a law that a certain definite number of taxpayers, say ten or a hundred, should have the right to bring suit to enjoin any officer of the United States from expending money in an unconstitutional manner").

merits of the constitutional questions involved were not considered. The position of Massachusetts was stated to be that the appropriation was for local and not national purposes and that the legislation usurped the powers of the states. Mr. Justice Sutherland observed for a unanimous court that nothing was to be done under the legislation without the consent of the state and that the question as presented was a political and not a judicial question. So the state could not maintain the suits in its own behalf. Nor could it sue as the representative of its citizens since they were also citizens of the United States and in their relations with the federal government the United States and not Massachusetts stood in the position of *parens patriae*. The suit of Mrs. Frothingham was dismissed because an individual taxpayer's interest in the money in the federal Treasury was considered minute and indeterminable and the possibility of future injurious effect on her tax bill was considered too remote to be the basis of a suit in equity.

One section of the Doughton resolution would impose a tax on cigarettes and the next section would direct the Secretary of the Treasury to allocate and pay to the states one-sixth of the amount collected under the first section.<sup>74</sup> This it would seem is altogether different from the statute challenged in the *Frothingham* case. That was an appropriation statute alone; whereas the Doughton resolution would impose a tax and would provide that part of it should be paid to the states. Though it seems that practically all ways are blocked to test an appropriation of funds in general, it should not be difficult to get into court with a statute which levies a tax for an alleged unconstitutional purpose. The taxpayer, here the cigarette manufacturer, could pay the tax under protest and sue to recover since one-sixth of the particular tax he was forced to pay was to go for the alleged illegal purpose of distribution to the states. Whether it would be to the best interest of the cigarette manufacturer to contest the statute is a different question. Suppose that instead of levying a tax for distribution, one statute levied the tax and an independent statute provided that the Secretary of the Treasury should distribute a specified amount of money—not from any particular source of revenue—to states which refrained from taxing tobacco. This would be analogous to the *Frothingham* case. Were it desirable to avoid a contest of a distribution statute that sort of arrangement might be helpful.

<sup>74</sup> *Supra* note 13.



It is believed that it is not desirable to try to prevent a test of the constitutionality of federal aid for particular projects or of federal collection of taxes and distribution to the states. There should be a decision on the merits of the power of Congress to levy taxes to provide for the general welfare. It is very unlikely that the federal government of 1789 had the constitutional power to levy taxes for distribution to the states but it is just as probable that such a procedure is within the constitutional power of the federal government of 1934, for the Constitution today of course is that of 1789 plus nearly a century and a half of growth.